(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: FEB 13 2015 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The Director also invalidated the underlying labor certification. The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). We subsequently reopened the case on service motion to reconsider the appeal. The Director's decision to invalidate the labor certification will be withdrawn, but the appeal will be dismissed.

The petitioner is a nursery specializing in [redacted] On July 30, 2010 it filed a Form I-140, Immigrant Petition for Alien Worker, seeking to permanently employ the beneficiary in the United States as a director and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on June 11, 2008, and certified by the DOL (labor certification) on June 18, 2010.

On March 3, 2011, the Director denied the petition on the ground that the evidence of record failed to establish that the proffered position was a *bona fide* job opportunity open to U.S. workers. The Director found that the beneficiary's prominent positions in the company since its incorporation in [redacted] – including incorporator, board of directors member, secretary, chief financial officer, and chief executive officer – demonstrated that the beneficiary had a central role in the company and indicated that the proffered position, in which the beneficiary had already been employed by the petitioner since 2000-2001, was not really open to U.S. workers. The Director also found that the full extent of the beneficiary's relationship to the petitioner was not disclosed to the DOL during the labor certification process, and that this non-disclosure constituted willful misrepresentation of a material fact. Therefore, the Director invalidated the labor certification [redacted] in accordance with the regulatory authority granted by 20 C.F.R. § 656.30(d).[1]

On March 31, 2011, the petitioner filed a timely appeal, indicating on the Form I-290B that a brief and/or additional evidence would be submitted to the AAO within 30 days. We conduct appellate

[1] The regulation at 20 C.F.R. § 656.30(d) provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). All pertinent evidence in the record will be considered, including new evidence properly submitted upon appeal.

On February 1, 2013, we summarily dismissed the appeal on the ground that the petitioner failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal. In particular, we found that no brief or additional evidence had been submitted, as promised on the Form I-290B.

Subsequent to the summary dismissal we discovered that the petitioner did submit a brief and supporting documentation within the prescribed 30-day period.[2] Since these materials were not considered in our previous decision, we reopened this proceeding on December 23, 2014, in accordance with our authority under 8 C.F.R. § 103.5(a)(5)(ii). The petitioner was afforded 30 days to respond to the notice and request for evidence.[3] No response was received from the petitioner during the 30-day period, or at any time up to the date of this decision.[4] The record is therefore complete.

In her decision of March 3, 2011, denying the petition and invalidating the labor certification, the Director based her findings that the proffered position was not a *bona fide* job opportunity open to U.S. workers, and that the petitioner and the beneficiary willfully misrepresented a material fact in the labor certification process, primarily on the petitioner's answer to question C.9 on the ETA Form 9089. That two-part question asks the following: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" While the employer (petitioner) checked "No" on the ETA Form 9089, the Director stated that the employer should have answered "Yes." The Director acknowledged that the beneficiary had no ownership interest in the petitioner, but asserted that the beneficiary's extensive business relationship with the petitioner compelled an affirmative answer to the second part of question C.9. The Director discussed the beneficiary's prominent position in the petitioner's business, as gleaned from the documentation in the record, and concluded that the petitioner had failed to establish that the proffered position was a *bona fide* job opportunity open to U.S. workers. The Director also concluded that the failure of the petitioner and the beneficiary to disclose the full extent of their business relationship to the DOL constituted the willful misrepresentation of a material fact that warranted the invalidation of the labor certification.

[2] The record shows that a brief from counsel and supporting documentation were received at the AAO on April 28, 2011.

[3] The multi-prong notice was entitled "Notice of Reopening on Service Motion, Notice of Intent to Dismiss, and Request for Evidence."

[4] The petitioner has not informed us of a change in address and no correspondence sent by us to the petitioner has been returned as undeliverable. On December 23, 2014 we also sent the petitioner a request for a new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, noting that the petitioner's original counsel was no longer with the law office that submitted the Form G-28 on appeal. No response to our request has been received, either from the petitioner or the petitioner's former counsel.

In the appeal brief and supporting materials that were overlooked by us in our initial decision, the petitioner explained that not only did the beneficiary have no ownership interest in the petitioner, the beneficiary also has no familial relationship with any owner, officer, or other corporate representative of the petitioner. The evidence of record supports this claim. We determine, therefore, that the Director was incorrect in finding that the petitioner should have checked "Yes" to the question at C.9. Neither part of question C.9 asked the petitioner whether it had an extensive business relationship with the beneficiary. Nor was that question asked of either party elsewhere in the ETA Form 9089. Accordingly, we find that no willful misrepresentation of a material fact was committed by the petitioner or the beneficiary during the labor certification process. The Director's affirmative finding on this issue will therefore be withdrawn. As 20 C.F.R. § 656.30(d) requires a finding of fraud or willful misrepresentation when USCIS invalidates a labor certification, and no such finding was made in this proceeding, the Director's invalidation of the labor certification must also be withdrawn.

While we are persuaded that the petitioner and the beneficiary did not engage in willful misrepresentation of a material fact, we nonetheless agree with the Director's findings that the petitioner did not fully divulge the beneficiary's prominent role(s) in its business operations during the labor certification process before the DOL, and thus failed to establish that the proffered position, already occupied by the beneficiary, was truly open to U.S. workers. As discussed in the Director's decision of March 3, 2011, and our notice of December 23, 2014, the factors to be examined in determining whether a *bona fide* job offer exists are set forth in a decision by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.* 89-INA-288 (BALCA 1991). Those factors include such items as whether the alien beneficiary (a) is in the position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to the corporate directors, officer, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her persuasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. As discussed in the Director's decision, the evidence of record shows that multiple factors apply to the beneficiary's relationship with the petitioner in this case. Accordingly, we affirm the Director's finding that the petitioner has failed to establish that the proffered position of "director" is a *bona fide* job opportunity open to U.S. workers. On this ground alone, the petition cannot be approved.

In our notice and request for evidence on December 23, 2014, we discussed three other issues that must be addressed before a decision is issued on the appeal. They include: (1) the beneficiary's educational credentials; (2) the beneficiary's experience; and (3) the petitioner's ability to pay the proffered wage. The three issues were presented as follows:

> A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l),

(12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also, Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS [U.S. Citizenship and Immigration Services] may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

On the ETA Form 9089, you specified the minimum educational requirement for the proffered position – "director" – as a master's degree in industrial engineering or "a foreign educational equivalent" (Part H, lines 4, 4-B, and 9). You also specified a minimum experience requirement of 24 months in the job offered or in an alternate occupation incorporating management experience (Part H, lines 6 and 10). In addition, you specified that no alternate combination of education and experience is acceptable (Part H, line 8).

The evidence of record shows that the beneficiary was awarded a "*Titulo Universitario Oficial de Ingeniero Industrial*" (Official University Title of Industrial Engineer) from the [redacted] following completion of a five-year degree program from 1992 to 1997. You have submitted an Academic Equivalency Evaluation from The [redacted] which claims that the beneficiary's credential is equivalent to a Master of Science in Industrial Engineering from an accredited university in the United States. We have doubts, however, that the degree in question is actually equivalent to a U.S. master's degree.

We have consulted the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), as another resource to evaluate the beneficiary's educational credential. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." http://www.aacrao.org/about-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the

[5] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

entire Council. *Id.* USCIS) considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

With regard to the beneficiary's "*Titulo de Ingeniero*" from the [redacted] EDGE describes it as a credential "[a]warded after 5 years of post-secondary study in engineering" that is "**comparable to a bachelor's degree in the United States.**" (Emphasis added.) The pertinent extract from EDGE is enclosed.

Based on the credential advice of EDGE, it does not appear that the beneficiary has the equivalent of a U.S. master's degree, as required in the labor certification to qualify for the proffered position and for classification as an advanced degree professional. Therefore, we intend to dismiss your appeal on this ground.

Since you are claiming that the beneficiary's "*Titulo de Ingeniero*" is equivalent to a U.S. master's degree – please reconcile this claim with the information from EDGE indicating that it is comparable to a U.S. bachelor's degree.

As for the beneficiary's experience, the regulation at 8 C.F.R. § 204.5(g)(l) states the following with respect to the documentary evidence required:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

You have submitted a letter from the human resources director of a printing company in [redacted] who states that the beneficiary worked at the company from March 16, 1998 to April 30, 2000, and "was in charge of the production planning in the binding section." This brief reference to the beneficiary's work activity falls short of the regulatory requirement because it does not provide "a specific description of the duties performed by the alien."

Accordingly, please submit another letter attesting to the beneficiary's qualifying experience that complies with the substantive requirements of 8 C.F.R. § 204.5(g)(l).

You must also establish your company's continuing ability to pay the proffered wage – $150,000 per year, as specified on your labor certification – from the priority date (June 11, 2008)[6] up to the present. The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

[6] The priority date of an I-140 petition is the date the underlying labor certification application was received for processing by the DOL.

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The current record includes copies of your company's federal income tax returns (Forms 1120) for the years 2008 and 2009, as well as the Forms W-2, Wage and Tax Statements, you issued to the beneficiary for those two years.

To bring the record up to date, please submit copies of your company's federal income tax returns for the years 2010-2013.

In addition, please submit copies of the Forms W-2 your company issued to the beneficiary for the years 2010-2013, and the three most recent pay statements issued to the beneficiary in 2014.

You are hereby afforded **30 days** to respond to this notice and request for evidence. *See* 8 C.F.R. § 103.2(b)(8)(iv). If you choose to respond, please submit your response to the address shown on the first page of this letter. Also, please attach a copy of this letter on top of any such submission.

If you choose not to respond, please note that we will dismiss the appeal without further discussion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). We will be unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in this notice and request for evidence.

As previously mentioned, the petitioner did not respond to the foregoing notice and request for evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In this case, the petitioner's failure to submit requested evidence has blocked multiple lines of inquiry.

Thus, the petitioner has failed to establish three additional elements of this petition, including (1) that the beneficiary has the requisite educational degree, as specified in the labor certification, to be eligible for classification as an advanced degree professional; (2) that the beneficiary has the requisite experience, as specified in the labor certification, to qualify for the proffered position; and (3) that the petitioner has had continuing ability to pay the proffered wage from the priority date up to the present. For these reasons as well, the petition cannot be approved.

Conclusion

For the reasons discussed in this decision, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The Director's finding that the petitioner and the beneficiary engaged in the willful misrepresentation of a material fact in the labor certification process will be withdrawn. The labor certification will be reinstated.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed. The Director's finding that the petitioner and the beneficiary willfully misrepresented a material fact in the labor certification process is withdrawn. The labor certification, [redacted] is reinstated.